

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

JOHN SUTTON, GAIL SUTTON and
DANIELLE SUTTON,

No C 06-0472 VRW

ORDER

Plaintiff,

v

KATHLEEN LLEWELLYN, Individually
and DBA HAWLEY AND LLEWELLYN,
LLC; ALBERT NICORA, Individually
and DBA NICORA AND MINOR, LLC;
JAVAID SHEIKH; LISA GALDOS,
Individually and in her official
capacity as Court Executive
Officer,

Defendants.

Defendants Kathleen Llewellyn and Lisa Galdos have filed separate motions to dismiss for failure to state a claim upon which relief can be granted under FRCP 12(b)(6). Plaintiffs have moved for entry of default judgment against defendants Albert Nicora and Javaid Sheikh and moved for injunctive relief against Galdos. The court has received and reviewed memoranda from the parties and finds it appropriate for decision without oral argument. For the reasons stated herein, Llewellyn's and Galdos's motions are GRANTED and plaintiffs' motions are DENIED.

I

The instant action is one of three cases filed in this court that arise from conservatorship proceedings opened in 2003 in Monterey county concerning Letitia Breng Rose, Gail Sutton's mother. See CAND No C-04-4176 (Rose v Hogan); CAND No C-05-4469 (Sutton v Teets). Following are the undisputed facts pertinent to these motions.

On January 23, 2004, the superior court in Monterey County appointed Llewellyn as counsel to Rose in her conservatorship proceeding. Doc # 1 at 4-6. Galdos served as the Court Executive Officer for the superior court during this time. Id at 4. On April 30, 2004, the superior court granted Llewellyn's request to withdraw as counsel and appointed Nicora as her replacement. Id at 4, 8. Subsequently, after Rose passed away, Llewellyn placed her obituary in the newspaper, but she neither requested nor received compensation for this service. Doc # 1 at 7; Doc # 8 at 3; Doc # 9 at 2; Doc # 12, Ex F at 2.

Plaintiffs John, Gail and Danielle Sutton are Rose's son-in-law, daughter and granddaughter, respectively. On January 24, 2006, they initiated this action pro se on behalf of themselves and the estate of Rose against defendants "Kathleen Llewellyn, individually and DBA Hawley and Llewellyn, LLC; Albert Nicora individually and DBA Nicora and Minor, LLC; Javaid Sheikh; and Lisa Galdos, individually and in her official capacity as Court Executive Officer." Doc # 1 at 1-2. Plaintiffs seek damages from Llewellyn, alleging breach of fiduciary duty, legal malpractice, deprivation of plaintiffs' and Rose's fundamental rights without due process, conspiracy and fraud. Id at 5-10. They also seek the

1 "disbarment of Kathleen Llewellyn." Id. Plaintiffs assert nearly
2 identical claims against Nicora, with the exception of fraud and
3 conspiracy which they do not allege. Id at 10-15. Plaintiffs
4 further assert claims against Sheikh, a physician, for medical
5 malpractice, fraud, conspiracy and breach of "ethical" duty. Id at
6 15-16. Against Galdos, plaintiffs allege deprivation of their and
7 Rose's constitutional rights, specifically "14th Amendment, Equal
8 Protection and First Amendment/Due Process." Id at 17. Finally,
9 the complaint includes allegations of defendants' defamation and
10 intentional infliction of emotional distress. Doc # 1 at 18.

11 On April 28, 2006, Llewellyn filed her motion to dismiss
12 all claims against her under Rule 12(b)(6). Doc # 7. On June 7,
13 2006, Galdos filed a similar motion with respect to the claims
14 against her. Doc # 15. On June 12, plaintiffs moved for entry of
15 default judgment against defendant Sheikh. Doc # 18. On June 14,
16 plaintiffs moved for entry of default judgment against defendant
17 Nicora. Doc # 25. Nicora filed his answer to the complaint on the
18 same date. Doc # 22. On July 13, plaintiffs filed a motion for
19 injunctive relief against Galdos. Doc # 33. On July 20, Sheikh
20 moved to dismiss the claims against him. Doc # 35. This order
21 addresses all but the last of these motions.

22
23 II

24 As a preliminary matter, to the extent that plaintiffs
25 seek to recover on behalf of Rose or her estate, they lack standing
26 to sue. First, "[a] litigant appearing in propria persona has no
27 authority to represent anyone other than himself," so plaintiffs,
28 filing pro se, cannot sue on Rose's behalf. Russell v United

1 States, 308 F2d 78, 79 (9th Cir 1962). Secondly, plaintiffs admit
2 that they "are not executors" or personal representatives of Rose's
3 estate, Doc # 10 at 5, so they cannot sue on behalf of the estate.
4 Cal Prob Code § 9820; Bernard E Witkin, 4 California Procedure §
5 115 at 175 (4th ed 2006). Lastly, the standing issue has already
6 been litigated and determined against plaintiffs in New York
7 federal district court in related case C-05-4469 before it was
8 transferred to this court. Doc # 8, Ex A at 8-9. For reasons of
9 comity, the court defers to and applies that prior determination,
10 with which it, moreover, agrees. Plaintiffs have already been
11 afforded a full and fair opportunity to establish standing and may
12 not relitigate the issue here.

13 The court now turns to the merits of the motions.

14
15 A

16 Defendant Llewellyn has moved to dismiss all claims
17 against her. Assuming arguendo that plaintiffs have any claims
18 against Llewellyn that are not brought on behalf of Rose or her
19 estate, all such claims are time-barred. California Code of Civil
20 Procedure § 340.6 provides in pertinent part:

21 An action against an attorney for a wrongful act or
22 omission, other than for actual fraud, arising in
23 the performance of professional services shall be
24 commenced within one year after the plaintiff
discovers, or through the use of reasonable
diligence should have discovered, the facts
constituting the wrongful act or omission * * *.

25 Cal Code Civ Proc § 340.6. Try as they might to characterize them
26 otherwise, all of plaintiffs' allegations arise entirely from
27 Llewellyn's performance of professional services as counsel for
28 Rose. This relationship ended on April 30, 2004, when Llewellyn

1 withdrew as counsel, and her subsequent publication of the obituary
2 was not a legal service that extended the period of her
3 representation. Hence, plaintiffs' suit filed on January 24, 2006,
4 was well beyond the one-year statute of limitations.

5 Moreover, the very documents submitted to the court by
6 plaintiffs on this motion establish their deep involvement in
7 Rose's affairs and in the conservatorship proceeding before and
8 during the period in which Llewellyn represented her. See Doc #
9 12, Ex D (letter from Kenneth Kroopf warning plaintiffs to stop
10 harassing Rose); id, Ex E (letter from Rose's bookkeeper citing
11 plaintiffs' persistent interference with her work); id, Ex G (email
12 from Llewellyn to John Sutton). See also Doc # 14, Ex A
13 (conservatorship proceeding minutes note appearance by Gail Sutton
14 on January 23, 2004). Given plaintiffs' extensive involvement with
15 Rose's affairs and those of her agents, including Llewellyn,
16 plaintiffs are without excuse for delaying their suit against
17 Llewellyn for allegedly wrongful acts beyond the statute of
18 limitations.

19 Plaintiffs assert that their action is not time-barred
20 because the statute should toll due to fraud or concealment by
21 Llewellyn. In that regard, they attempt to invoke the exception in
22 § 340.6 for "actual fraud." But "[i]n all averments of fraud or
23 mistake, the circumstances constituting fraud or mistake shall be
24 stated with particularity." FRCP 9(b). "While statements of the
25 time, place and nature of the alleged fraudulent activities are
26 sufficient, mere conclusory allegations of fraud are insufficient."
27 Moore v Kayport Package Express, Inc, 885 F2d 531, 540 (9th Cir
28 1989). Plaintiffs merely allege that Llewellyn "conspired with

1 [others] for the sole purpose of defrauding Mrs Rose." Doc # 1 at
2 10 (emphasis omitted). See also Doc # 9 at 2-3 (alleging fraud,
3 fraudulent misrepresentation, conspiracy and abuse of process
4 without supporting facts). Therefore, plaintiffs cannot invoke the
5 "actual fraud" exception to toll the statute.

6 Plaintiff Danielle Sutton also argues that her claims are
7 not time-barred because "she was a minor in 2003." Doc # 23 at 3.
8 California Code of Civil Procedure § 352(a) provides that "[i]f a
9 person entitled to bring an action * * * is, at the time the cause
10 of action accrued either under the age of majority or insane, the
11 time of the disability is not part of the time limited for the
12 commencement of the action." Even if Danielle Sutton were able
13 avail herself of the tolling provision by establishing that she did
14 not reach the age of majority more than one year before the filing
15 of this action, however, her effort to pursue claims against
16 Llewellyn would be futile. Danielle Sutton has no cause of action
17 for breach of fiduciary duty or legal malpractice since she was
18 never represented by Llewellyn. The complaint does not allege that
19 Llewellyn defamed Danielle Sutton or intentionally inflicted
20 emotional distress on her, and the fraud allegations suffer from
21 lack of particularity as stated above. Hence, even if Danielle
22 Sutton is not time-barred from bringing suit, her claims still
23 would not survive a motion to dismiss under FRCP 12(b)(6).

24 In fact, even if John and Gail Suttons' claims were not
25 time-barred, their allegations lack merit. The court has already
26 determined that plaintiffs have no claims for breach of fiduciary
27 duty and legal malpractice since Llewellyn only represented Rose,
28 and plaintiffs lack standing to sue on her behalf. Also, as

1 discussed above, plaintiffs' allegations of fraud and conspiracy to
2 commit fraud lack the requisite particularity under Rule 9 to
3 survive a motion to dismiss, and their opposition papers contain
4 nothing but more conclusory allegations of sufficiency. See Doc #
5 10 at 7 (denying pleading's deficiency and asserting the existence
6 of a prima facie case without adducing additional facts).

7 As for plaintiffs' claim for intentional infliction of
8 emotional distress, they must allege: (1) "extreme and outrageous
9 conduct by the defendant with the intention of causing, or reckless
10 disregard of the probability of causing, emotional distress;" (2)
11 that plaintiff[s] suffered "severe or extreme" emotional distress;
12 and (3) causation. Christensen v Superior Court, 54 Cal 3d 868,
13 903 (1992) (internal quotations omitted). In order to be
14 "outrageous," conduct "must be so extreme as to exceed all bounds
15 of that usually tolerated in a civilized community." *Id.*

16 Further, "[i]t is not enough that the conduct be
17 intentional and outrageous. It must be conduct directed at the
18 plaintiff, or occur in the presence of a plaintiff of whom the
19 defendant is aware." *Id.* at 905. "The only exception to this rule
20 is that recognized when the defendant is aware, but acts with
21 reckless disregard, of the plaintiff and the probability that his
22 or her conduct will cause severe emotional distress to that
23 plaintiff." *Id.* "Where reckless disregard of the plaintiff's
24 interests is the theory of recovery, the presence of the plaintiff
25 at the time the outrageous conduct occurs * * * justifies recovery
26 * * *." *Id.* at 906 (emphasis added).

27 Plaintiffs do not allege that Llewellyn, or any
28 defendant, directed their actions to plaintiffs so as intentionally

to cause emotional distress. Nor do plaintiffs allege that any defendants acted with reckless disregard in their presence to cause such distress. Thus, plaintiffs have failed to set forth a claim for intentional infliction of emotional distress.

Plaintiffs' claims for defamation are equally deficient. They allege Llewellyn defamed them in a letter to a New York district attorney when she attempted to secure a restraining order against plaintiffs. Doc # 1 at 18. But as Llewellyn correctly points out, a communication "in the initiation or course of [a] proceeding authorized by law," such as a request for a restraining order, is absolutely privileged under California law. Cal Civil Code § 47. Plaintiffs also allege defamation based on Llewellyn's letter to Montgomery Jones, Doc # 1 Ex H, but the letter contains only a recitation of facts known to both Llewellyn and Jones and statements of opinion, which are not actionable. Hence, plaintiffs have not alleged a cause of action for defamation against Llewellyn.

The court has determined that amendment would be futile to cure the deficiencies in plaintiffs' pleadings against Llewellyn. Accordingly, the court GRANTS defendant Llewellyn's motion to dismiss. All claims against defendant Llewellyn are DISMISSED without leave to amend.

B

Defendant Galdos moves to dismiss all claims against her on the ground of absolute judicial immunity. "Court clerks have absolute quasi-judicial immunity from damages for civil rights violations when they perform tasks that are an integral part of the

1 judicial process." Mullis v United States Bankruptcy Court, 828
2 F2d 1385, 1390 (9th Cir 1987). For example, in Mullis, the
3 plaintiff alleged that a bankruptcy court clerk failed to give him
4 proper counseling and notice on how to file his petitions, accepted
5 and filed an incomplete petition, and refused to accept an amended
6 petition. *Id.* The court held that "[e]ven if all of these
7 allegations are taken as true, they all properly are characterized
8 as integral parts of the judicial process." *Id.* "The clerk of
9 court and deputy clerks are the officials through whom such filing
10 is done. Consequently, the clerks qualify for quasi-judicial
11 immunity unless these acts were done in the clear absence of all
12 jurisdiction." *Id.*

13 In the case at bar, plaintiffs allege that, as the Court
14 Executive Officer, Galdos "runs a kangaroo probate court" and that
15 she "deprived Mrs Rose and the Suttons of a Jury trial, the right
16 to speak and be heard in court * * *, the right to court orders and
17 document[s] and equal protection under the law." Doc # 1 at 17
18 (emphasis removed). Even if these allegations are taken as true,
19 Galdos's actions with respect to plaintiffs' filings and
20 appearances in court are all properly characterized as integral
21 parts of the judicial process. Moreover, plaintiffs do not allege
22 that Galdos acted in the clear absence of jurisdiction. Hence,
23 Galdos is entitled to quasi-judicial immunity.

24 Accordingly, the court GRANTS defendant Galdos's motion
25 to dismiss. All claims against defendant Galdos are DISMISSED
26 without leave to amend.

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9

C

Plaintiffs have filed a motion for entry of default judgment against defendant Nicora. But entry of default under FRCP 55(a) must precede a grant of default judgment under FRCP 55(b). Because plaintiffs failed to seek from the clerk entry of default against Nicora before filing their motion, their motion was premature when filed and is now moot in light of Nicora's intervening answer. FRCP 55. The motion for entry of default judgment is DENIED.

D

Plaintiffs have filed a motion for entry of default judgment against defendant Sheikh. As with plaintiffs' motion for entry of default against defendant Nicora, they failed to seek from the clerk entry of default against Sheikh. Hence, their motion was premature when filed and is now moot in light of Sheikh's intervening motion to dismiss. FRCP 55. The motion for entry of default judgment is DENIED.

E

Plaintiffs move to enjoin Galdos from her allegedly discriminatory treatment of their filings. Doc # 33 at 1. In their moving papers, they assert, inter alia, that: they were unable to obtain a hearing because they did not pay the fee; they were told they had to pay a fee, but no fee should have been required; the fee they were required to pay was higher than it should have been; their filings were refused for "frivolous"

1 reasons, such as the certificate of service; and they were forced
2 to have hearings when they did not want a hearing. Id at

3 The court first notes that plaintiffs' allegations of
4 being overcharged and having filings refused for failure to pay fees
5 appear to lack merit. Plaintiffs attached the fee schedule from the
6 Monterey county superior court (id, Ex A), which shows that no fees
7 are required for "[o]ppositions to petition for appointment of
8 conservator * * * filed by or on behalf of the proposed
9 conservatee." Doc # 33, Ex A. For all other types of filings, fees
10 are required. Since Rose was the conservatee and plaintiffs were
11 not her appointed representatives, their filings would not be "by or
12 on behalf of" Rose and would be subject to fees.

13 Even if all of plaintiffs' allegations were true,
14 however, Galdos's alleged actions with respect to plaintiffs'
15 filings are properly characterized as integral parts of the
16 judicial process, for which she enjoys quasi-judicial immunity from
17 both damages and injunctive relief. 42 USC § 1983, the statute
18 under which plaintiffs would proceed against Galdos in federal
19 court, specifically provides that "in any action brought against a
20 judicial officer for an act or omission taken in such officer's
21 judicial capacity, injunctive relief shall not be granted unless a
22 declaratory decree was violated or declaratory relief was
23 unavailable." Hence, Galdos's immunity extends to actions for
24 injunctive relief. See also Acuna v Fireside Thrift Co, 2006 US
25 Dist LEXIS 30102 (D Ariz 2006) ("[I]f a defendant can successfully
26 assert judicial immunity from damages, that immunity will also bar
27 declaratory and injunctive relief.")

28 Plaintiffs' motion for injunctive relief is DENIED.

III

This summarizes the court's orders:

1) the court GRANTS defendant Llewellyn's motion to dismiss without leave to amend (Doc # 7);

2) the court GRANTS defendant Galdos's motion to dismiss without leave to amend (Doc # 15);

3) the court DENIES plaintiffs' motion for entry of default judgment against Sheikh (Doc # 18).

4) the court DENIES plaintiffs' motion for entry of default judgment against Nicora (Doc # 25).

5) the court DENIES plaintiffs' motion for injunctive relief against Galdos (Doc # 33).

IT IS SO ORDERED.



VAUGHN R WALKER
United States District Judge